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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-20

VINCENT ALO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Vincent Alo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 19, 1971.

OPINIONS BELOW

The opinion of the Second Circuit, rendered on February 19, 1971, is reported at 439 F.2d 751, and is reprinted in the Appendix hereto, p. 1a, *infra*. An unreported memorandum opinion of the United States District Court for the Southern District of New York, denying a motion to dismiss the indictment, is reprinted in the Appendix hereto, p. 14a, *infra*.

JURISDICTION

On February 19, 1971, the Second Circuit entered its judgment affirming the judgment of conviction entered by the District Court following a jury verdict finding the petitioner guilty of the crime of obstructing the administration of the federal securities laws in violation of 18 U.S.C. § 1505. He was sentenced to imprisonment for five years on each of two counts, to run concurrently, and to a fine of $5,000 on each count.

Petitioner filed a timely petition for rehearing, requesting rehearing both by the panel of Judges hearing the appeal and by all the active Judges *en banc*. On April 26, 1971, the said panel entered an order denying rehearing. Eight days later, on May 4, 1971, an order was entered, signed by the Chief Judge, denying the petition for rehearing insofar as it requested rehearing *en banc*, "no active circuit judge having requested that a vote be taken on said suggestion." The foregoing judgment and the two orders respecting rehearing are reprinted in the Appendix hereto.

On timely application, Mr. Justice Harlan on May 20, 1971, signed an order extending the time for filing this petition for certiorari to and including July 3, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a post-indictment trial delay of nearly three years violates a federal defendant's right to a speedy trial under the Sixth Amendment where (a) the Government was at all times fully aware of the facts constituting the alleged offense yet presents no excuse or justification for the trial delay, and (b) the defend-

ant is found to have suffered no prejudice and no hampering in the preparation of his defense.

2. Whether the mere giving of false and evasive answers to questions put to a witness in a federal administrative proceeding constitutes an obstruction or impediment to "the due and proper administration of the law under which such proceeding is being had" within the meaning of 18 U.S.C. § 1505.

3. Whether a federal indictment is void for vagueness where the indictment (a) alleges that the defendant obstructed "the due and proper administration of the law" under which an administrative proceeding was being had in that he gave "false and evasive answers to questions put to him as a witness," but (b) fails to identify which of a large number of answers are considered false and evasive and fails to specify which answers are false and which are evasive.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .

Title 18, United States Code:

§ *1505. Obstruction of proceedings before departments, agencies, and committees*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any

committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On October 27, 1969, a two-count indictment was filed in the United States District Court for the Southern District of New York against the petitioner, Vincent Alo. The two counts differed only as to the days in-

volved, the first count referring to May 25, 1966, and the second count referring to May 26, 1966. App. A4-A5. Each count alleged that on the day in question

> ". . . the defendant, did unlawfully, wilfully, knowingly and corruptly obstruct and impede and endeavor to obstruct and impede the due and proper administration of laws of the United States, to wit, the Securities Act of 1933 and the Securities Exchange Act of 1934 as amended, under which a proceeding, to wit an examination and private investigation entitled 'In the Matter of Tel-A-Sign, Inc.', before a department and agency of the United States, to wit the Securities and Exchange Commission, was then pending and being had, by giving false and evasive answers to questions put to him as a witness in such proceeding."

At the foot of each count was a reference to "(Title 18, United States Code, Section 1505)."

Following a four-day trial before the Honorable Constance Baker Motley, United States District Judge, the jury returned a verdict finding Alo guilty on both counts. The judgment of conviction was entered on October 27, 1970, and Alo was sentenced to terms of imprisonment of five years on each count, to run concurrently, and to a fine of $5,000 on each count. Alo was remanded and is presently serving his sentence, bail pending appeal having been denied both by the District Court and the Second Circuit. The Second Circuit affirmed the conviction on February 19, 1971, and rehearing requests were denied.

The relevant facts, as developed at the trial and in other proceedings in the courts below, may be chronologically summarized as follows:

A. The Warwick Hotel meetings—1964

In 1963, a Florida attorney, one Alvin Malnik, organized Scopitone, Inc., to manufacture and distribute a patented coin-operated movie machine known as "Scopitone." The shares of the corporation were in the names of two groups: (1) Malnik and his associates held 50% of the shares, and (2) Maurice Uchitel and three others [the "Uchitel Group"] held the other 50%.

In 1964, Scopitone, Inc., merged with Tel-A-Sign, Inc., a public corporation whose stock was traded on the American Exchange. Malnik handled the entire transaction for Scopitone, Inc., whereby Tel-A-Sign exchanged one-third of its shares for 80% of the outstanding stock of Scopitone, Inc. A dispute then arose between Malnik and the Uchitel Group as to whether the proceeds of the merger had been properly distributed among them. The Uchitel Group was aggrieved by the amount of Tel-A-Sign stock distributed to the four individuals constituting the Group.

The petitioner Alo had no stock interest in either Scopitone, Inc., or Tel-A-Sign, Inc., and was in no way involved in or benefited by the merger. App. 284. But Alo did know all of the individuals involved in the two contending groups. It was in his capacity as an acquaintance of all concerned that Alo arranged for two meetings of the Uchitel Group at the Warwick Hotel in New York City. Alo's subsequent failure to remember some of the details of these two meetings in 1964 was to form the basis of the 1969 indictment and 1970 conviction.

The various members of the Uchitel Group were called as witnesses by the Government in the trial of

petitioner in 1970. At that time, their memory of the two Warwick Hotel meetings was hazy as to details. But they were all agreed that Alo's role was simply to suggest that the disgruntled group settle the dispute between themselves and Malnik without resort to lawyers and litigation. Alo did little talking at the meetings since he knew little if anything about the dispute; the witnesses agreed that "Alo said at the meeting . . . that he wasn't fully versed in the particulars of this particular dispute, but all that he wanted to do was to bring his friends, if he could, together without litigation and expense." App. 284-285; 254. According to the witnesses, Uchitel "did virtually all the talking" at these meetings and it was difficult for the others to "get a word in edgewise." App. 251, 255.

Alo's efforts to bring the parties together at these two Warwick Hotel meetings were unsuccessful. Alo then dropped out of the picture; he never met again with the parties to discuss the Tel-A-Sign matter or the settlement of the dispute. App. 253. But at some later point the Uchitel Group did meet out of the presence of Alo and decided to settle "for what they could get." App. 270.

B. The S.E.C. inquiry—1966

Late in 1964 Tel-A-Sign filed a registration statement with the Securities and Exchange Commission, seeking to register about 90,000 unregistered shares of its stock then held by individuals. The S.E.C. thereafter ordered an investigation into matters relating to Tel-A-Sign's acquisition of Scopitone, Inc. In particular, the S.E.C. sought to learn "whether or not there were any undisclosed shareholders [of Tel-A-Sign] or

any principals who were not named in the registration statement." App. 97. The petitioner Alo and one Gerardo Catena were two individuals suspected by the S.E.C. of being undisclosed principals. App. 102. And, inasmuch as the settlement of the stock distribution dispute had been revealed to the S.E.C. in an amendment to the registration statement, the S.E.C. inquiry was also directed at the relationship of the Malnick and Uchitel groups and the terms of the settlement that had been reached. App. 102-103.

In May of 1966, the petitioner Alo was subpoenaed to testify before S.E.C. representatives regarding the Tel-A-Sign matter. At this point, Alo was approximately 62 years of age. App. 575. Accompanying Alo at the S.E.C. hearing was his attorney of some 44 years standing at the bar, Henry B. Chapman. Mr. Chapman actively participated as counsel in the proceedings and, as he later testified at the trial, he had advised Alo concerning his testimony as follows:

> "I told Mr. Alo that his response to any question put to him, unless he had a firm and definite knowledge and recollection of the events which would lead to the answer to the question posed, he was in no way to equivocate, speculate or say anything that he was not certain of; that it was perfectly proper for him to answer 'I have no present recollection' or 'I don't remember at this time' or some similar pattern of words." App. 436.

> "My only advice was to tell the absolute truth as he recalled it and, when he did not recall, either because of the lapse of time or because the matter was not of any importance, to rely upon my advice and to say that he had no present recollection or that was his best recollection, or some such similar pattern of words." App. 438-439.

The S.E.C. hearing covered two days, May 25 and 26, 1966. The transcript of that hearing was later read aloud to the jury at petitioner's trial in 1970. App. 327-421. That transcript reveals that Alo unequivocally responded to questions probing his relationships with the parties in question. App. 330, 331, 340. And he categorically denied that he or his family had any financial interest, disclosed or undisclosed, in either of the two corporations. App. 329, 330, 353, 371-380, 414-415. Similarly, Alo directly answered questions as to whether he had promoted or profited from the "Scopitone" machine. App. 384, 387, 388-391. He fully explained that he had attended the New York meetings at the request of Malnik to see whether a settlement with the Uchitel Group could be arranged. App. 335-338, 361, 370. Indeed, the S.E.C. attorney who testified at the trial admitted that Alo had provided the information that the S.E.C. investigators were most desirous of securing—the information as to Alo's own connection with the transactions and the names of the others involved in the discussions as to stock distribution. App. 141-142, 150-154. Alo has never been challenged as to the accuracy or truthfulness of his replies to such questions.

During the course of this two-day hearing, Alo responded fully and unequivocally to more than 500 questions, covering all the matters with which the S.E.C. was primarily concerned. But there were, by any fair count, somewhat less than 100 occasions on which Alo failed to recall some of the minutiae of the Warwick Hotel meetings or to remember precisely what was said at those meetings. Accepting his attorney's advice, Alo responded "I don't remember" or "I have no present recollection" to a substantial number of

such questions as to which he felt he had no firm knowledge or recollection. Such answers presumably formed the basis of Alo's subsequent indictment on the charge of having obstructed justice by giving false and evasive answers to the S.E.C. interrogators.

The Government told the jury (App. 527) and stated in its brief below (p. 7) that "134 times he claimed lack of recollection in testimony lasting not much more than an hour and a half," and the Second Circuit's opinion (Appendix hereto, p. 4a, *infra*) repeated the Government's numerical generality. That calculation, however, is not borne out by any fair reading of the S.E.C. transcript; nor does the number 134 emerge from the marked copy of that transcript supplied by the Government in response to Alo's request for particulars, wherein the responses questioned by the Government were bracketed in blue. Some of the "memory lapses" marked by the Government were cured by Alo in later portions of the hearing.[1] Other marked responses, apparently deemed false or obstructive in some manner, were quite responsive and unequivocal in nature and were confirmed at the trial by the Govern-

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[1] An outstanding instance of such curing of a "memory lapse" involved the several questions as to the name of the hotel in which the meetings took place. On the first day of the S.E.C. hearing, Alo responded "I just can't remember" when asked the name of the hotel. App. 334. But at the start of the second day's hearing, after refreshing his memory overnight, Alo corrected the record by identifying the Warwick Hotel as the place where the meetings occurred. App. 404. The Government made no attempt to bring this correction to the jury's attention, or to subtract the original answers from the calculation of 134 "memory lapses" mentioned to the jury. App. 527.

ment's own witnesses.[2] Many of the answers blue-marked by the Government were in response to the same questions repeated or asked in slightly different form. See, e.g., App. 342-343. Some of the questions themselves were confusing; others called for Alo's best recollection, if any. App. 333.

Any accurate accounting and appraisal of these so-call "memory lapses," which by any fair count were far less numerous than claimed by the Government, can only be achieved by a careful reading of both the S.E.C. and the trial transcripts. Suffice it to say that by any count they constituted no more than 15% of the total number of questions answered. And while it is impossible to say which answers the Government actually claimed were false or evasive, the following questions are typical of what was blue-marked by the Government in the transcript handed to Alo's counsel:

1. Have you ever heard of the corporation, "Scopitone"? App. 330. Alo responded he "might have heard of it" but didn't recall "any specific recollection of it." The S.E.C. interrogator later indicated his own confusion as to which corporation he was asking about, Scopitone, Inc., or Scopitone

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[2] Thus at one point in the S.E.C. hearing Alo was asked, "Was anyone else present at this time when Mr. Malnik contacted you to discuss this matter?". Alo's answer, marked in blue by the Government, was "No." App. 338. No attempt was ever made to prove this answer false.

Similarly, the Government marked as evasive or false in some manner the following response by Alo: "He just told me about the stock distribution, that they had some differences, and just asked me to ask them to get together and settle this in a peaceful and nice way so they could avoid courts and lawyers, and so forth and so on." App. 342. This version of Alo's role was never proved false; indeed it was confirmed by the Government's own witnesses. App. 190, 245.

of Florida, Inc. App. 371-372. But the main focus of the foregoing question seemed to be in relation to the Tel-A-Sign merger with Scopitone, as to which Alo gave responsive answers. App. 331.

2. What was the name of the hotel? Whose hotel room was it? Was this hotel located on Central Park South? App. 334. Subsequently, Alo identified the hotel and thus in effect answered all these questions. App. 404.

3. Did anyone come in or out of this room while this meeting was being held? App. 335. Alo's failure to recall is an understandable one.

4. When did Mr. Malnik contact you for this purpose? . . . To the best of your recollection, the approximate date? . . . Was it a week before the meeting, a month before the meeting, to the best of your recollection? App. 337. Alo's failure to recall the date is understandable in view of the fact that both Alo and Malnik lived in Florida and saw each other frequently. App. 335.

5. Did Mr. Malnik indicate to you what the differences about the stock distribution between these men were? App. 342. But Alo had already stated that he had not been told the details, App. 341, and this failure to recall was merely confirmatory.

6. Did you ask anyone on your behalf to set up this meeting with Messrs. Green, Kaye, Miniaci and Whitel? App. 344. Alo responded that his memory was not clear as to such a detail occurring two years previously.

7. O.K. For example, did you ask a friend of yours to contact anyone in connection with the settlement of this matter during this time period? App. 345. This was another detail he could not remember.

8. Do you recall who arrived first of these four men? Do you recall if they all arrived at the same time?

App. 349. Neither Alo nor the Government witnesses could recall such minor details, and the S.E.C. interrogator agreed that if Alo didn't recall such details he should "so state for the record". App. 350.

9. Do you recall if anyone contacted you to go to that particular hotel on the day of the meeting? App. 351. Alo did not recall such a minor detail.

10. Did anyone else say anything at this meeting other than yourself and Mr. Uchitel? App. 354. Alo responded that he did not recall anyone other than Uchitel saying anything.

11. At this meeting did Mr. Uchitel state to you how the individuals obtained their shares of stock in Tel-A-Sign? App. 356. Alo's present recollection was that he did not remember, but he had already stated that he had not been told and did not know the details of the stock distribution.

12. Did Mr. Uchitel ask you why you were getting involved in trying to settle this? App. 358. Alo did not recall whether such a precise question was asked, but Alo had previously indicated that he was getting involved as a friend of all concerned.

13. You testified that you did not recall whether this meeting was held in the morning, afternoon or evening . . . Would it assist in refreshing your recollection to ask you the question whether there was any food served at this meeting? For example, was there dinner, breakfast or lunch served? App. 362. It would be difficult for anyone to recall such details as to such a meeting held nearly two years previously.

14. Do you know where in Miami Beach you told him this? App. 365. Alo's failure to recall is understandable in view of his frequent associations with Malnik in Florida.

15. How long did this meeting last? What was discussed at this meeting? App. 409. Alo responded that his memory was vague but he presumed that the discussion concerned the same things discussed at the first meeting.

16. Do you recall whether or not you paid for the room or suite? App. 410. The failure to recall such a minor and irrelevant detail is understandable.

17. But you don't recall what was said by whom to whom? App. 411. Such a general question would be hard to answer with certainty.

At the end of the hearing, Alo was given the opportunity to correct or change any such testimony, but no corrections or changes were in fact made. App. 420-421.

C. The suppressed indictment—1966

Several months after testifying at the S.E.C. hearing, Alo was called before a federal grand jury and questioned; he invoked his privilege under the Fifth Amendment and declined to testify. App. 11. It is also apparent, from the prosecution's pre-trial arguments, that various members of the Uchitel Group were also called before the grand jury "at about the same time that he [Alo] testified" before the S.E.C. and questioned with reference to the subjects of the S.E.C. inquiry. App. 18. And when the Government, during the trial in 1970, sought to impeach one of its witnesses by use of his grand jury testimony, it was clear that such testimony had been given in 1966. App. 269-270. Much of that 1966 grand jury testimony was supplied to Alo's counsel prior to trial, as the Government stated below in response to the petition for rehearing.

Such grand jury inquiries led Alo's counsel to suspect that an indictment may have been returned by the grand jury sometime in 1966 but never made public, and that the terms of the secret indictment were substantially identical to the 1969 indictment that led to Alo's conviction. That suspicion formed one of the predicates for Alo's pre-trial motion to dismiss the 1969 indictment on the ground that he had been denied his constitutional right to a speedy trial. App. 11. The prosecutor's response was "to concede for the sake of argument—and I haven't investigated all of the facts—but I am willing to concede for the sake of argument that there was a prior sealed indictment." App. 20. District Judge Weinfeld denied the motion without prejudice to renewal, but remarked that the suspicion if true "would be a rather remarkable state of affairs." App. 12.

Before the Second Circuit, the Government candidly referred to its agreement to the assumption "that there was a prior sealed indictment filed by a Grand Jury sometime in the latter part of 1966 which charged the same or similar criminal conduct as the indictment on which Alo was tried" and that the 1966 indictment "was never unsealed." Brief, p. 13. The Government's position, however, was "that the court should assume for purposes of this case that such a sealed indictment exists, but that its existence is not material to issues raised by the defendant." Brief, p. 13 fn. Thus the Government's position was that even assuming there was a sealed indictment in 1966 the ensuing three-year delay before trial in no way prejudiced Alo in terms of his right to a speedy trial, a position sustained by the courts below. See memorandum opinion of Judge Motley, Appendix hereto, p. 14a, *infra;* opinion of Second Circuit, pp. 7a-9a, *infra.*

The opinion of the Second Circuit (Appendix hereto, p. 7a, *infra*) commented on the peculiar position of the Government regarding the 1966 indictment:

> "Alo strongly urges that he was deprived of his sixth amendment right to a speedy trial. He claims that the 1969 indictment merely supplanted a substantially identical sealed indictment returned in 1966. Although the government has steadfastly refused to concede the existence of a 1966 indictment, neither has it denied Alo's contention. Both parties have argued the case on the assumption that such an indictment was returned, and we will do the same."

Moreover, before denying Alo's petition for rehearing *en banc*, the Second Circuit called for a response from the Government to that portion of the petition that renewed Alo's objection to the Government's persistent failure to concede or deny the existence of a 1966 indictment.[3] But the Government's response avoided any mention of the question whether there had been an indictment returned in 1966 and merely claimed that Alo's counsel had been fully supplied with the statements made "at a 1966 Grand Jury investigation," in compliance with 18 U.S.C. § 3500. There this strange matter now rests.

D. The vague and indefinite indictment—1969

The indictment returned against Alo in 1969 alleged in conclusory terms that he had obstructed the administration of the federal securities laws "by giving false

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[3] The petition for rehearing *en banc* requested that a hearing be ordered at which the facts concerning the 1966 indictment could be developed. During the oral argument before the Second Circuit panel that decided the case Government counsel was asked at least four times whether an indictment had in fact been returned in 1966, but no adequate answer was given.

and evasive answers to questions put to him as a witness" at the S.E.C. hearing. No specification was made in the indictment as to which answers were false or evasive or how many such answers could be so described.

Alo's counsel first moved for particulars. In response, the Government mailed Alo's counsel a copy of the entire S.E.C. transcript on which a substantial number of answers were bracketed in blue as indicative of what the Government would claim on trial were false and evasive. App. 15. Such "particulars," which did not specify which answers were false and which were evasive or in what respect the answers were false, proved inadequate to enable Alo to prepare a meaningful defense to specific charges of falsity and evasiveness.

Alo's successor counsel then moved to dismiss the indictment for failure to conform to the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure. App. 5. District Judge Weinfeld felt disposed to grant the motion because of the obvious lack of specifics in the indictment, but he finally ruled that Alo's previous motion for a bill of particulars constituted a waiver of any claim with respect to the indictment. App. 13-15. At the same time, after warning the Government never to draw "an indictment like this again and have it come before me" because "it wouldn't stand up," District Judge Weinfeld directed the Government to supply further particulars. App. 16-17. As to each answer, he directed,

> "Set forth whether or not you claim it is false, and then upon the trial you will have to show it was false; and also in what respect you claim the

answer was evasive. There is a difference between the two." App. 16-17.

In later affirming District Judge Weinfeld's denial of Alo's objections to the indictment, the Second Circuit indicated the nature of the Government's response to Judge Weinfeld's direction. That response took the form of a generalized assertion that unspecified answers were false in that "Alo in fact remembered the facts he claimed to have forgotten" and that unspecified answers were evasive in that "poor recollection was repeatedly invoked to avoid giving the SEC responsive answers." Appendix hereto, p. 11a, *infra*.[4] At the trial itself, the Government made no effort to prove or pinpoint which answers were false and which were evasive, and in what respects, despite District Judge Weinfeld's clear direction.

Moreover, the 1969 indictment, as returned by the grand jury, referred in the caption and in the body of the two counts to "VINCENT ALO, a/k/a Jimmy Blue Eyes." App. A4-A5. Upon Alo's motion to strike these prejudicial references to the alias, District Judge Weinfeld ruled that since there was no issue in the case as to the identity of Alo there was no justifica-

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[4] The second bill of particulars is reproduced at App. A6. It reads:

"1. It will be claimed that the defendant Alo gave false answers in that he in fact did remember facts responsive to the questions put to him where he disclaimed memory of such facts.

"2. It will be further claimed at trial that the defendant Alo gave evasive answers where he disclaimed memory or gave answers such as "My present recollection is, I do not remember that." (Transcript of May 25, 1966, p. 22) Or "I don't know, I don't recall . . ." (*Id.* at p. 31) and the like with a purpose to evade giving informative responses to the questions put to him."

tion for the "a/k/a" references in the indictment. Those references were stricken. App. A-4, A-5, 19.[5] Nevertheless, at the trial the Government insisted on bringing to the jury's attention, in the course of utilizing a witness' grand jury testimony to impeach that witness, a reference to Alo's alleged alias, "Jimmy Blue Eyes." App. 269-270. The Government was permitted to exploit this alias only after extended protest by Alo's counsel and a ruling by the trial judge that such a reference was not prejudicial since

> "Blue eyes are regarded as something beautiful in this society . . . . this term Blue Eyes is not in the category of, what was it, Benny The Bug or Machine-Gun Kelly. Blue eyes is not generally thought of as a derogatory term in this society and unless you bring out the fact that he was a prize-fighter and the blue eyes refers to his black and blue eyes from fighting, the jury will never know that." App. 266-267.

It need only be added that the one exhibit called for by the jury was the page of the grand jury testimony which contained the "Jimmy Blue Eyes" references and which had been introduced as a formal exhibit by the Government. App. 560, 563.

E. The trial and verdict—1970

The evidence submitted to the jury by the Government in support of the indictment consisted of the following:

(1) The testimony of an S.E.C. attorney, who was present when Alo was questioned, as to the background

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[5] Probably by inadvertence, the orders of the Second Circuit denying rehearing utilize the stricken caption reference to "a/k/a Jimmy Blue Eyes." See Appendix hereto, pp. 12a, 13a, *infra*.

and purposes of the S.E.C. inquiry. He conceded, on cross-examination, that the major areas of the S.E.C. inquiry had been answered by Alo.

(2) The testimony of the four members of the Uchitel Group as to what transpired at the Warwick Hotel meetings. All of them corroborated Alo's limited role at the meetings. In some respects, they were able to remember more of the details of the discussions than Alo could recall, but as to many of the incidental details of the meetings they exhibited a similar or even greater lack of recall.

(3) An oral reading before the jury of the entire transcript of the S.E.C. hearing. No effort was made to identify, during this reading or otherwise, the particular answers which the Government contended were false or evasive.

The sole witness presented by the defense was Henry K. Chapman, the attorney who accompanied Alo to the hearing and who advised him to plead a lack of recall whenever that was in fact the state of his recollection.

The Government at no point in the trial attempted to prove the falsity or evasiveness of any particular answer by Alo at the S.E.C. hearing. Rather, as indicated in its summation to the jury, the Government relied upon what it conceived to be the "incredible" failure of Alo to remember so many details of what transpired at the Warwick Hotel meetings years before the inquiry. After quoting some but not all of the "memory lapses," the prosecutor concluded his plea by suggesting that by "Mr. Alo's testimony and nothing more the government will prove that he obstructed justice. I just pulled out a few of these answers. It is 134 'I don't remembers' in a 99-page transcript." App. 527.

The court's charge to the jury imposed no duty to find any particular answer either false or evasive. The jury was simply told that, to find Alo guilty, it must find beyond a reasonable doubt "that the defendant Alo did corruptly obstruct or impede or endeavor to obstruct or impede this proceeding by giving false and evasive answers to questions put to him as a witness in this proceeding, and that he did so knowingly and wilfully." App. 540.

The jury's verdict was a simple one: "We find the defendant guilty of both counts." App. 572. No special verdict was rendered, and the jury made no findings as to which of the various answers were false and which were evasive.

F. The Second Circuit decision—1971

In affirming Alo's conviction on both counts of the 1969 indictment, the Second Circuit ruled:

(1) The evasive answers of a witness before an administrative agency constitutes an obstruction to "the due and proper administration of the law" administered by that agency within the meaning of 18 U.S.C. § 1505.

(2) Even assuming that there was a sealed indictment in 1966, there was no denial of Alo's right to a speedy trial since the three-day delay between that indictment and the trial did not prejudice Alo or hamper his capacity to present a defense. Moreover, said the court, prejudice for purposes of the Sixth Amendment's speedy trial clause cannot be presumed from such a delay; prejudice or at least the credible possibility of prejudice must be demonstrated by the defendant.

(3) The 1969 indictment was not void for lack of specificity as to the answers deemed false or evasive, particularly since the indictment was supplemented by two bills of particulars.

REASONS FOR GRANTING THE WRIT

The issues posed by the Second Circuit's decision are of critical importance not only to those concerned with the proper administration of federal criminal law but to all the countless individuals who are called upon to testify before federal courts and federal administrative agencies. The decision below, left unreviewed and uncorrected, poses a new and ominous threat to all such witnesses who articulate their honest inability to remember details of past events, even when properly advised by their counsel to testify only to those details that they can truthfully recall.

The Second Circuit, by a revolutionary *tour de force* of statutory construction, has literally created a new crime—that of a federal witness obstructing justice and the administration of law by the mere act of giving false and evasive testimony on the witness stand. The court has created that crime without adopting the protective rules of evidence that normally surround prosecutions for the act of giving false and evasive testimony, such as the "two-witness" requirement in perjury accusations. See *Weiler* v. *United States*, 323 U.S. 606 (1945). And it has imported this new crime of obstruction by false testimony into a narrowly drawn Congressional scheme designed to protect the witnesses themselves, as well as documentary evidence, from corrupt influences.

Equally egregious is the Second Circuit's notion that this new offense need not be demonstrated by proof

that any particular response by the witness was in fact false or evasive. And the Second Circuit apparently feels it unnecessary that the defending witness or the jury be apprised as to which of a series of "memory lapses" are deemed false or evasive. As this case demonstrates, this new offense is established if the witness has responded "'I don't recall" on numerous enough occasions to permit a jury or an appellate court to conclude that it is "incredible" to believe that the witness was not thereby giving false and evasive testimony and was not thereby obstructing justice.

The appropriateness of granting certiorari in this instance, however, goes beyond the Second Circuit's unwarranted exercise in creating a new federal crime of uncertain and elusive contours. That court has also rendered a decision that in several respects conflicts with decisions of this Court and of other Circuits. And it has imposed a most questionable limitation on the constitutional concept of a speedy trial, a limitation that is currently pending before this Court in another proceeding. *United States* v. *Marion,* No. 70-19, Oct. Term, 1971, jurisdiction postponed, 401 U.S. 934. These various factors, developed hereinafter, combine to justify this Court's grant of certiorari to review all aspects of the decision below.

Underlying this entire case, in addition, is the Government's lack of candor with reference to the existence of a secret indictment, supposedly returned in 1966. Such a matter deserves exploration by this Court. Cf. *Berger* v. *United States,* 295 U.S. 78 (1935).

1. Important problems are raised as to the constitutional right to a speedy trial, some of which are pending before this Court in the Marion case

The steadfast refusal of the Government to affirm or deny that the petitioner was indicted in 1966, shortly after his S.E.C. testimony, has placed the speedy trial problems in a unique posture. But those speedy trial problems are nonetheless appropriate for review by this Court.

If, as the Second Circuit was willing to assume, there was such a secret or sealed indictment in 1966, the ensuing three-year delay before the trial early in 1970 poses the following problems:

(A) Is such prosecutorial delay unreasonable or "purposeful or oppressive," *Pollard* v. *United States*, 352 U.S. 354, 361 (1958), for Sixth Amendment purposes where no valid excuse or reason for the post-indictment delay is demonstrated or even indicated? The precise scope of the terms "purposeful or oppressive" has never been delineated, but in *Dickey* v. *Florida*, 398 U.S. 30, 38 (1970), this Court condemned as "intolerable as a matter of fact and impermissible as a matter of law" a prosecutorial delay of nearly eight years, combined with prejudice to the defendant, where "no valid reason for the delay existed."[6]

It is difficult to avoid labeling the delay in this case as "purposeful" and "intolerable," a delay as to which the Second Circuit found that the Government "has offered no justification for its dalliance." Appendix hereto, p. 8a, *infra*. The Government obviously knew from the beginning all the facts and events that it deemed to be indictable and it presented those facts to

[6] In *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir. 1958), an unexcused delay of nearly four years was deemed an undue delay within the meaning of the Sixth Amendment even where no prejudice to the defendant had been shown.

a grand jury in 1966, long before the trial.[7] Not even an "institutional inefficiency," the lack of available prosecutors to try the case, has been advanced as an excuse for the delay. Compare *United States* v. *Marion*, No. 70-19, Oct. Term 1971, jurisdiction postponed, 401 U.S. 934, where such an excuse has been suggested. But if this prosecutorial delay be deemed no more than mere negligence, what Mr. Justice Brennan said in his concurring opinion in the *Dickey* case, 398 U.S. at 51-52, then becomes pertinent:

> "A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right [to a speedy trial] as a purposeful failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials."

Obviously, this problem of defining the unreasonableness of prosecutorial delay deserves fuller consideration by this Court. It is part of the matters that will be before this Court this coming term in the *Marion* appeal, *supra*, and simultaneously consideration of both this and the *Marion* situations might be deemed appropriate.

(B) Assuming this prosecutorial delay is deemed unreasonable or purposeful, must the defendant prove that he has in fact been prejudiced by the delay or can such prejudice be presumed? Here the Second Circuit has rejected the speedy trial claim mainly on its own feeling that Alo was in no way prejudiced by the delay. Appendix hereto, p. 8a, *infra*. But as Mr. Jus-

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[7] The 1966 grand jury testimony was apparently not repeated in 1969, when the second indictment was returned. The grand jury testimony used by the Government to impeach one of its own witnesses at the 1970 trial was testimony given before a grand jury in 1966. App. 269-270.

tice Brennan noted in his *Dickey* concurrence, 398 U.S. at 53, "concrete evidence of prejudice is often not at hand" and "it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses."[8] There is, in addition, no "ready way of establishing the prejudice to community interests from delay." *Ibid.*, 54.

It may well be, therefore, that the basic premise of the Speedy Trial Clause of the Sixth Amendment is that unreasonable delays are by their nature prejudicial and that it is not necessary in such situations for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. The Court of Appeals for the District of Columbia Circuit has so held, *Hedgepeth* v. *United States*, 364 F.2d 684, 687 (1966),[9] and the Second Circuit's express refusal

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[8] As was stated in *Ross* v. *United States*, 349 F.2d 210, 215 (App. D.C., 1965), "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter . . . . In a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice."

In the *Ross* case, the court had found a purposeful delay of seven months between offense and arrest.

[9] The court said in *Hedgepeth:* "The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. Of course, the likelihood of prejudice is undoubtedly an inevitable consideration in determining whether a particular delay is undue . . . . Prejudice is considered to be presumed from, or necessarily inherent in, a long delay. *Petition of Provoo*, 17 F.R.D. 183, 203 (D. Md.), affirmed *per curiam*, 350 U.S. 857 (1955)." 364 F. 2d at 687, fn. 3.

In *Hedgepeth*, the elapsed time between arrest and trial was slightly more than a year. The period between indictment and trial was a little over ten and a half months.

to accept that view in this case (Appendix hereto, pp. 8a-9a, *infra*) must be deemed to create a conflict.

Moreover, while the pending *Marion* appeal deals with pre-indictment rather than post-indictment delay, a critical issue in that case is whether prejudice must be proved or may be assumed from an unreasonable delay. As stated in the Solicitor General's jurisdictional statement (p. 8) in *Marion*, it is the Government's contention that even if the Government's inaction "were regarded as purposeful or oppressive, this still would not warrant dismissal of the indictment unless serious prejudice to the appellees were established." Whether that contention is valid as to post-indictment delays is essentially the question raised by the instant case. By considering the *Marion* case and this case together, this Court can effectively resolve the recurring problem of the degree of prejudice, if any, that must be demonstrated where there has been an unreasonable prosecutorial delay either before or after the return of an indictment.

The other possibility stemming from the Government's refusal to acknowledge the existence of an indictment in 1966 is that there was no such indictment. If that be the true situation, however, the foregoing problems are simply transferred into the context of a pre-indictment delay of approximately three years. Then the coincidence between this and the *Marion* case becomes virtually complete. Both cases should be resolved together.[10]

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[10] The sole question posed by the jurisdictional statement in *Marion* (p. 2) is: "Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendant." The pre-indictment delay in *Marion* was of approximately three-year duration.

But it should be noted that the Court postponed the question

2. By misconstruing the federal scheme designed to outlaw obstructions to the due administration of law, the Second Circuit has created a direct conflict with the Sixth and Ninth Circuits

The 1969 indictment alleged that Alo had obstructed the due and proper administration of the federal securities laws, in violation of 18 U.S.C. § 1505, solely in that he gave "false and evasive answers" as a witness in an administrative proceeding conducted by the S.E.C. There was no suggestion that Alo intimated or endeavored to influence any other witness who testified before the S.E.C., or that he concealed or falsified any documentary evidence relevant to the S.E.C. inquiry.

The statute involved, 18 U.S.C. § 1505, does not by its terms attempt to outlaw the giving of false and evasive answers in federal administrative proceedings. Section 1505 seeks only to reach certain types of obstructions of justice, such as coercing a witness or tampering with physical evidence, that interfere with the due administration of federal laws. By incorporating the giving of false and evasive answers into the statutory concept of obstructing the due administration of federal laws, the Second Circuit has rendered a result at war not only with established principles of statutory construction but with the legislative history of § 1505 and relevant decisions of the other Circuits.

To begin with, § 1505 must be viewed in conjunction with § 1503, which has a legislative ancestry going back to Section 2 of the Act of March 2, 1831, 4 Stat.

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of jurisdiction in *Marion* until the hearing on the merits. 401 U.S. 934. This indicates that there is a jurisdictional problem which, if resolved adversely to the Government, may make it impossible for the Court to reach the speedy trial problems.

487.[11] Section 1 of the 1831 Act had limited the power of federal courts to inflict summary punishment to cases of misbehavior in the presence of the court or "so near thereto as to obstruct the administration of justice."[12] Section 2 of the 1831 Act was an attempt to punish similar obstructions that might occur out of the presence or near-presence of the court. It was recognized that some obstructions, such as coercing witnesses and altering documents, would normally occur far away from the court room and that summary contempt powers could not reach such obstructions. Hence the penal provisions of what is now § 1503 were born.

Section 1505 was enacted in 1940 for the express purpose of extending to witnesses before House and Senate committees and before administrative agencies the protection which § 1503 had long extended to witnesses in federal courts. The House Judiciary Committee, reporting on the bill that became § 1505, pointed out that:

> "This proposed legislation simply extends the protection now provided by law for witnesses in Court proceedings, to witnesses in proceedings before either House of Congress or committees of

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[11] Section 2 of the 1831 Act provided penal sanctions for any person attempting to influence or intimidate any juror, witness or officer in any court of the United States in the discharge of his duty or, by threats or force, obstructing or impeding "the due administration of justice therein." 4 Stat. 487.

[12] Section 1 of the 1831 Act has been separately codified as 18 U.S.C. § 401.

The giving of false and evasive testimony in the court room would be misbehavior in the presence of the court and subject to summary punishment, *provided* that such testimony is found to be obstructive of justice. See *In re Michael*, 326 U.S. 224 (1945); *Ex parte Hudgings*, 249 U.S. 378 (1919); *Collins* v. *United States*, 269 F. 2d 745 (9th Cir. 1959); *Richardson* v. *United States*, 273 F. 2d 144 (8th Cir. 1959).

either House (or joint committees), and to witnesses in proceedings before administrative agencies of the Government.

"The need for outlawing intimidation and corruption applies to every witness. The noncourt witness is entitled to the same protection as is the court witness. There is no distinction or difference. The cause of justice requires that every witness should testify without fear or interference." H. Rep. No. 1143, 76th Cong., 1st Sess., p. 1.

Senator O'Mahoney, the chairman of the Senate Judiciary Committee and a sponsor of the legislation, gave this further explanation:

"At the present time, if a witness should be called before the Interstate Commerce Commission, some person not a witness before that Commission could with complete impunity threaten him that if he testified to the truth he would lose his job, for example, and there would be no recourse. This bill provides that, if any person should so threaten such a witness, such person would be guilty of a criminal offense not punishable by the Interstate Commerce Commission but cognizable in a court of law and punished by such court. That is all the bill does. It extends to witnesses before a committee of the House or the Senate, before a joint committee, or before a commission or board the same protection that is now thrown about witneses elsewhere." 84 Cong. Rec. 10912.

Thus, § 1505 was in no way designed to outlaw false and evasive testimony on the administrative witness stand. It was created in the precise image of § 1503, which in turn had been separated long ago from the original statute that had dealt in an entirely different section with the contumaceous act of testifying falsely

in the court room. Section 1505, like § 1503, was designed solely to protect witnesses and evidentiary material from corrupting and intimidating influences, influences that are of a different caliber than a witness' own oral testimony.

This complete and historic parallelism between § 1503 (relating to federal court proceedings) and § 1505 (relating to legislative and administrative proceedings)[13]

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[13] The parallelism between the two sections is readily apparent:

§ 1503	§ 1505
"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness, in any court of the United States, . . . or injures any party or witness in his person or property, . . . or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice [shall be fined or imprisoned, or both]."	"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness in any proceeding pending before any department or agency of the United States [or either House of Congress or joint committee] . . . or whoever injures any party or witness in his person or property . . . or whoever, with intent . . . to obstruct compliance . . . with any civil investigative demand . . . under the Antitrust Civil Process Act willfully removes . . . conceals, destroys, mutilates, alters, or by other means falsifies any documentary material . . . or whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States . . . [shall be fined or imprisoned, or both]."

serves to emphasize the questionable interpretation of § 1505 by the Second Circuit, which did not even consider the legislative history of that section, and to demonstrate the far-reaching consequences of that court's ruling. To wit:

(A) The plain language of both sections gives no basis for including within their sanctions the giving of false or evasive testimony on the witness stand. Nor does the legislative history support any such inclusion. To exclude such testimony from the reach of these sections is not to sanction or legitimatize them; false and evasive testimony has long been subject to appropriate contempt and perjury penalties arising out of legislative enactments distinct from either § 1503 or § 1505 or their predecessors. As the Second Circuit recognized, pp. 5a-6a, *infra*, a recalcitrant S.E.C. witness may be taken before a federal court, advised of his duty to furnish evidence, and held in contempt if he persists in his refusal to testify. 15 U.S.C. § 78u(c). Or such a witness may be prosecuted for perjury. 18 U.S.C. § 1621.

(B) Contrary to the established rules of narrow construction of criminal statutes and utilization of the *ejusdem generis* concept in reading a series of statutory phrases, the Second Circuit has misread and misapplied the broad catch-all language of § 1505 referring to "whoever corruptly . . . obstructs or impedes . . . the due administration of the law" under which the administrative proceeding is being had. The *ejusdem generis* rule provides that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class. See, e.g., *Garner* v. *Louisiana*, 368 U.S. 157, 168 (1961). And the preceding portions of § 1505 refer to only two specific types of obstruction: (1) attempts by others to

influence the testimony of witnesses either by actual or threatened coercion or by financial or other inducements; and (2) concealment or destruction of certain types of documentary evidence. The general "obstruction" language should thus be confined to similar types of interference.

The Second Circuit has refused to apply the *ejusdem generis* rule to § 1505. Appendix hereto, pp. 4a-5a, *infra*. It has thereby opened the door to prosecutions for any type of witness activity that a jury or court deems obstructive of the due administration of the law. In so ruling, the Second Circuit is directly in conflict with several rulings of the Sixth and Ninth Circuits dealing with almost precisely the same language in the parallel § 1503.

Thus in *United States* v. *Essex*, 401 F. 2d 214, 218 (6th Cir. 1969), the Sixth Circuit held that the act of filing a false affidavit in a federal court in support of an accused's motion for a new trial did not constitute an obstruction of justice within the meaning of § 1503. In refusing to broaden § 1503 "beyond the scope that Congress gave to it," the Sixth Circuit ruled (p. 218):

> "As a criminal statute 18 U.S.C. § 1503 requires strict construction. The general clause at its end, moreover, must be read to embrace only acts similar to those mentioned in the preceding specific language. Haili v. United States, 260 F. 2d 744 (9th Cir. 1958). Neither the language of Section 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice. If appellant committed any offense at all, it was . . . perjury . . ."

The Ninth Circuit has also read the § 1503 language dealing with the obstruction of "the due administra-

tion of justice" in the federal courts as limited by the *ejusdem generis* rule "to embrace only acts similar in nature to those acts enumerated by the preceding specific words"—which specific acts are identical to those specified in § 1505. *Haili* v. *United States,* 260 F. 2d 744, 746 (9th Cir. 1958); *United States* v. *Metcalf,* 435 F. 2d 754, 756-757 (9th Cir. 1970). Moreover, the Ninth Circuit in the *Metcalf* decision, 435 F. 2d at 757, rendered a further limitation on the broad "obstruction" language of § 1503 that is fully applicable to the "obstruction" provision of § 1505:

> "Moreover, the general provision, although it refers to the broad range of 'due administration of justice,' prohibits only specified types of impeding acts—*i.e.,* 'by threats or force,' or by threatening letter or communication.' Thus, not only must the broad term 'due administration of justice' be limited to pending judicial proceedings, but also the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions."

Needless to say, false or evasive testimony is not an intimidating act.

This conflict in the mode of interpreting virtually identical pieces of Congressional legislation merits the attention of this Court. And the importance of resolving that conflict comes from the very identity of the two sections, by which an authoritative or influential interpretation of § 1505 can serve as a precedent for the interpretation and application of § 1503, or vice versa. That is why the Second Circuit's decision has such far-reaching implications, touching not only witnesses in administrative and Congressional hearings but witnesses in the federal courts as well.

(c) Prior to the Second Circuit's decision in this case, there had not been a single decision upholding an indictment or conviction under either § 1503 or § 1505 in which the defendant was charged solely with having answered falsely or evasively as a witness.[14] The Second Circuit's opinion itself reveals both its uniqueness and its potential for mischievousness. That opinion openly confuses and equates the acts of burning one's files and testifying falsely or evasively, refusing to recognize that Congress has historically dealt separately with the prejurous and contemptuous implications of one's false testimony. Appendix hereto, p. 5a, *infra*. And the court has been frank to abandon, in its creation of this new crime, the "two witness" rule that accompanies prosecutions for perjury. Appendix hereto, pp. 5a-6a, *infra*. No standards of proof have been substituted in place of that "two-witness" rule other than the good but free-wheeling sense of judges and juries.

These are obviously matters that require the attention of this Court before they become embedded in the jurisprudence of § 1505 and of § 1503.

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[14] The few District Court decisions relied upon below by the Government are readily distinguishable. *United States* v. *Bonanno*, 177 F. Supp. 106 (S.D. N.Y. 1959), for example, sustained an indictment under § 1503 that charged that prospective witnesses had entered into an agreement to protect each other by testifying falsely and evasively; thus each witness was charged with inducing the other to alter his testimony. There was no allegation that either witness, apart from the inducement of the other, simply testified falsely or evasively. The *Bonanno* decision was reversed on other grounds, *sub nom. United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960). In *United States* v. *Cohen*, 202 F. Supp. 587 (D. Conn. 1962), the indictment charged a violation of § 1503 in that the defendant presented a falsified lease contract to a grand jury; but the indictment did not charge the defendant with simply giving false testimony himself.

3. The sustaining of the 1969 indictment, despite its lack of specificity as to the alleged false and evasive answers, directly conflicts with the principles of Russell v. United States, 369 U.S. 749.

The opinion of this Court in *Russell* v. *United States*, 369 U.S. 749 (1962), illuminates several respects in which the decision below falls short in maintaining the constitutional protection against vague and indefinite indictments. So serious are the deviations from the constitutional norms that it becomes appropriate for this Court to remind the federal judiciary once again that these basic norms permit of no exception.

(A) Particularly questionable in this case is the Second Circuit's attempt to brush aside petitioner's arguments respecting the validity of the 1969 indictment with the cavalier statement that there was little doubt in the court's mind that Alo "understood precisely what the phrase 'false and evasive answers' referred to." Appendix hereto, p. 16a, *infra*. What a court may think a defendant understands or what the defendant in fact understands would appear irrelevant to the thrust or the nature of the requirement that indictments by their own terms set forth all the elements of the alleged offense and apprise the defendant—without any uncertainty or ambiguity—of the nature of the accusation against him. See *Russell*, 369 U.S. at 765.

(B) In overcoming its own concession that "somewhat greater specificity would have been advisable" in this instance, the Second Circuit could point to only two so-called "specifics" in the indictment: (1) the broad charge, in the words of § 1505, that Alo obstructed the due administration of the federal securities laws; and (2) the equally broad charge, not found in § 1505 but said to be of a "fleshing out" nature, that

Alo obstructed by "giving false and evasive answers" at the S.E.C. proceeding.

But the *Russell* principles dictate that when guilt under a broadly worded statute depends upon a specific identification of fact, or a selection from among various factual possibilities, "an indictment must do more than simply repeat the language of the criminal statute." 369 U.S. at 764. Here, what was false or evasive, and hence what was thought to constitute an offense under § 1505, depended upon a specific identification of the challenged answers from among the hundreds supplied by Alo. Without such identification, the indictment must be considered void.[15] See *United States* v. *Agone,* 302 F. Supp. 1258, 1261 (S.D.N.Y. 1969), where Judge Frankel voided an indictment that failed to specify which of a substantial number of individuals was "the member of a labor organization" who was unlawfully intimidated; and see *United States* v. *Little,* 317 F. Supp. 1308 (D. Del. 1970), where an indictment was voided that alleged that the defendant refused to answer to the best of his knowledge "certain questions on schedules submitted to him" in connection with the 1970 census.[16]

[15] In the *Russell* cases, the various indictments were found void for failure to identify the matters under inquiry by the Congressional committees when certain questions were asked of the defendants. It was noted, however, that the questions that the defendants allegedly refused to answer "were then quoted verbatim under separately numbered counts." 369 U.S. at 753, n. 4. Such specification, the Court said, served to protect the defendants from again being put in jeopardy for the same offense. 369 U.S. at 764.

[16] A new and subsequent indictment in the *Little* case asserted that the defendant refused to answer "questions 8 through 12, inclusive, question A, questions H1 through H23, inclusive, and questions 13 through 41, inclusive." This indictment was validated, *United States* v. *Little,* 321 F. Supp. 388 (D. Del., 1971).

(C) The Second Circuit's last resort was to the two bills of particulars served by the Government. Appendix hereto, pp. 10a-11a, *infra*. But *Russell* makes that reliance unwarranted: ". . . it is a settled rule that a bill of particulars cannot save an invalid indictment." 369 U.S. at 770. Moreover, the two bills did nothing more than refer the petitioner to a variety of answers, some of them definite and many of them indicating a lack of present recall, leaving it to the defendant to wonder which particular answers were considered false and which were thought to be evasive.[17]

(D) The Second Circuit's validation of so vague and indefinite an indictment reopens all the evils that the *Russell* principles were designed to foreclose. Such an indictment reflects, among other things, a critical failure by the grand jury to perform its function under the Fifth Amendment of specifying what it conceived were the answers that were false and evasive and hence constituted the alleged violation of § 1505. It has left the prosecution free to fill in these vital missing elements and free to claim as false and evasive certain answers that the grand jury may have ignored in its deliberations. To borrow words from the *Russell* opinion, far from informing Alo of the nature of the false and evasive answers ascribed to him, "the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage

[17] The second bill of particulars (see footnote 4, p. 18, *supra*) gave two examples of what the Government said it would claim at the trial was evasive. The first instance was a failure to recall an incidental fact concerning the first Warwick Hotel meeting, whether Alo had called any of the participants by phone to set up this meeting. App. 343-344. The second example was a failure to recall how long Alo had spoken at the first meeting. App. 353. No other examples or answers were specified.

of each passing vicissitude of the trial and appeal." 369 U.S. at 768. And the prosecution has done just that in this case, emphasizing certain answers in its bills of particulars, referring to others in the course of trial, and shifting the emphasis to still other answers on the appeal. Neither the jury nor any court could determine from the indictment which version of Alo's alleged recalcitrance was really in issue.

The resulting confusion has made it impossible for Alo to know precisely what the accusations are or to formulate a meaningful defense thereto. And he has been further deprived of any protection against double jeopardy. Who can say which answers have been adjudged false and evasive, so as to permit Alo to plead such a conviction to bar another prosecution involving a particular answer? Has he, for example, been adjudged guilty of falsely not remembering the name of the hotel in which the meetings occurred, or could he now be prosecuted for perjury in connection with that answer?

Superimposed on the vague indictment, of course, is the fact that the giving of false and evasive answers is nowhere defined as a crime under § 1505. Without any statutory guidelines and armed only with the dubious notion that "I don't remember" is the necessary equivalent of a false or evasive answer, the prosecution and the jury were left free to speculate that so many such answers were given that it was "incredible" to believe that Alo was not guilty. No proof was required, no proof was offered, that any particular answer was false or evasive; the jury was simply given the entire S.E.C. transcript from which to speculate as it saw fit.

The amorphous nature of the indictment and the loose standards of guilt justified a full review of the de-

cision below. Indeed, the lack of specificity that permeates the indictment, the trial and the verdict is so complete as to raise a substantial question whether the verdict was totally deprived of evidentiary support, rendering the conviction void. See *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Washington* v. *United States,* 357 U.S. 348 (1958).

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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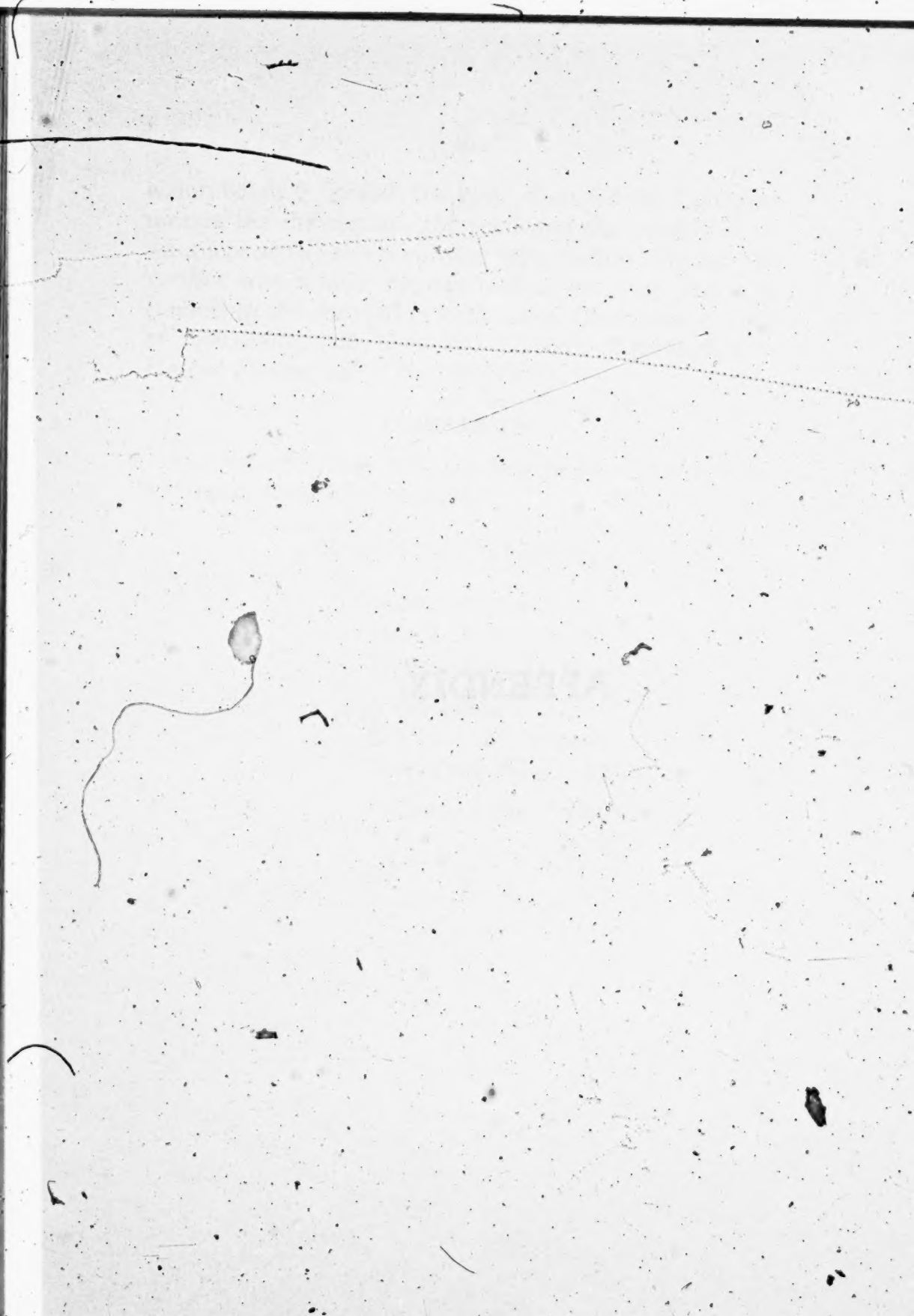

APPENDIX

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

No. 439, Docket 35579.

UNITED STATES OF AMERICA, *Appellee,*

v.

VINCENT ALO, *Defendant-Appellant.*

Argued Jan. 11, 1971.

Decided Feb. 19, 1971.

Appeal from conviction for obstructing administration of federal securities laws by Securities and Exchange Commission, following a trial in the United States District Court for the Southern District of New York before Constance Baker Motley, J., and a jury.

H. Richard Uviller, New York City (Benno Schmidt, Jr. and Jay Goldberg, New York City, on the brief), for appellant.

Gary P. Naftalis, Asst. U. S. Atty. (Whitney North Seymour, Jr., U. S. Atty., Ross Sandler, Shirah Neiman, John W. Nields, Jr., John H. Gross, Asst. U. S. Attys., S.D. N.Y.), for appellee.

Before WATERMAN, Senior Circuit Judge and FRIENDLY and KAUFMAN, Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

Vincent Alo, appealing from his conviction under 18 U.S.C. § 1505 for obstructing the Securities and Exchange Commission's administration of the federal securities laws, asserts three primary grounds for reversal: that, although the government may have proved other crimes not charged, its evidence did not support a conviction under § 1505; that he was denied his constitutional right to a speedy trial;

and that the indictment upon which he stood trial was unduly vague. We affirm.

I.

Alo's conviction was based on his testimony at an investigative proceeding conducted by the SEC on May 25-26, 1966. The object of the investigation was to determine the beneficial ownership of several large blocks of securities, valued at $7.6 million, which constituted approximately one-third of the total issued shares of Tel-A-Sign, Inc.[1] Appearing pursuant to a subpoena, Alo was questioned about a series of meetings which he had attended at the Warwick Hotel in New York in late 1964.

About one year prior to the meetings, a Miami Beach attorney, Alvin Malnik, organized Scopitone, Inc. to exploit in the United States a French variant on the familiar juke box: in addition to playing the chosen musical selection the Scopitone device showed a synchronized color film on a 26-inch screen. Ownership of Scopitone was evenly divided between Malnik and his associates and the "Uchitel group," which consisted of four business men from the New York area: Maurice Uchitel, a restaurant and real estate owner, Alfred Miniaci, Irving Kaye, and Abe Green, all involved in various aspects of the coin-operated machine industry.

On July 29, 1964, Malnik, using powers of attorney executed by the Scopitone shareholders, transferred an eighty percent interest in the corporation to Tel-A-Sign for stock then worth $3.5 million. Instead of dividing these pro-

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[1] Tel-A-Sign's registration in late 1965 of some 90,000 unregistered shares in the name of certain selling shareholders was the immediate occasion of the investigation. The Commission apparently had reason to believe that Alo and one Gerado Catena were the undisclosed beneficial owners of large blocks of Tel-A-Sign stock.

ceeds between himself and the Uchitel group, Malnik retained approximately nine-tenths of the Tel-A-Sign stock. Beyond this lopsided distribution of the Tel-A-Sign shares, Malnik proposed to keep the remaining twenty percent interest in Scopitone. The members of the Uchitel group objected strenuously to Malnik's division of the sale proceeds, as might well have been expected. Green protested directly to Malnik, who told him to arrange a meeting of all members of the Uchitel group. The resulting conference, the first of two at the Warwick Hotel in the latter part of 1964, was attended by Green, Miniaci, and Kaye, representing the Uchitel interests, and by Alo, who represented Malnik. Alo expressed the hope that a settlement could be reached without recourse to litigation, but insisted that Malnik had earned his lion's share of the proceeds by dint of his greater efforts in promoting the Scopitone venture. The Uchitel group insisted on a division according to the respective shares held in Scopitone, Inc. In Uchitel's absence, no agreement was reached.

The second conference at the Warwick was attended by Alo, Uchitel, Miniaci, and Kaye. Alo still pressed for a negotiated settlement but balked at the Uchitel group's insistence on thirty-five percent of the proceeds. A settlement was eventually reached in April 1965 when the Uchitel group agreed to accept approximately twenty-five percent. The SEC's investigation into these dealings began soon thereafter, when the Commission received information that Alo and Gerado Catena had been the real parties in interest in Scopitone, Inc. and that these two had thereby come into undisclosed beneficial ownership of large blocks of Tel-A-Sign stock.

At the SEC's investigative hearings some eighteen months after the Warwick Hotel meetings, Alo claimed to remember practically nothing about them beyond his own attendance at Malnik's request and the fact that they concerned a dispute over the distribution of Tel-A-Sign

stock. He had no recollection of a corporation named Scopitone, Inc.; or of how the Malnik-Uchitel dispute arose. He could not recall who arranged the meetings or how he learned when and where they would be held. As to what actually transpired at these meetings, Alo testified that he had forgotten all save that the Uchitel group was dissatisfied with its allocation of Tel-A-Sign stock and that he urged an amicable resolution of the dispute. Indeed, by the government's calculation Alo pleaded a memory lapse some 134 times in one and a half hour's testimony. The 1969 indictment on which Alo was tried charged that his answers were false and evasive, and that he intended thereby to frustrate the SEC's investigation.

II.

Alo argues that a witness's evasive answers before an administrative agency do not "obstruct, or impede the due and proper administration of the law." 18 U.S.C. § 1505. He seeks to escape the plain meaning of the broad language of § 1505 by directing our attention to a characteristic common to all of the more specific subdivisions of § 1505. That is, each of these provisions relates to tampering with sources of evidence *extrinsic to the actor,* such as the intimidation of a witness or the falsification of documents.[2]

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[2] 18 U.S.C. § 1505.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand

Invoking the principle of *ejusdem generis,* Alo argues that Congress must similarly have intended that the catchall language of § 1505 would not reach those who "obstruct * * * administration of the law" by suppressing their own knowledge of relevant facts.

So restrictive a gloss, however, would produce the anomalous result that concealing information recorded in one's papers would constitute, as the appellant concedes, an offense under § 1505, but concealing data recorded in one's memory would not. No rational basis for differentiating between these two types of evidence has been suggested to us, and without a clear statement of contrary Congressional intent we cannot attribute such an arbitrary distinction to the legislature. Like the specific provisions which precede it, § 1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence. The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.

Alo objects that such an interpretation of § 1505 will open an avenue for wholesale evasion of the so-called "two-witness rule" to which perjury convictions must

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duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

conform.[3] We disagree. It is true, that to convict Alo the jury had to conclude that he was lying when he professed loss of memory, but the gist of his offense was not the falsehood of his statements, but the deliberate concealment of his knowledge. The SEC was not interested in Alo's mnemonic powers, but in the details of the Warwick Hotel meetings. Alo's profession of forgetfulness was not so much false testimony as a refusal to testify at all.[4]

It is also argued that our reading of § 1505 will permit the government to circumvent the procedure set forth in § 21(c) of the Securities Exchange Act, 15 U.S.C. § 78u(c), whereby recalcitrant SEC witnesses may be taken before a federal court, advised of their duty to furnish evidence, and held in contempt if they persist in their refusal. But the same subsection provides a non-contempt misdemeanor penalty for unjustified refusal to obey an SEC subpoena, thereby negating any inference that Congress intended to make this contempt procedure the exclusive manner of dealing with stubborn witnesses.

Lastly, we must reject the suggestion that the § 21(c) misdemeanor provision itself preempts Alo's prosecution as a felon under § 1505 because it deals more specifically

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[3] See, e.g., Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945).

[4] See United States v. Appel, 211 F. 495, 496 (S.D.N.Y. 1913) (L. Hand, D. J.):

> If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.

Cf. United States v. Essex, 407 F.2d 214 (6th Cir. 1969) (interpreting 18 U.S.C. § 1503, judicial counterpart of § 1505, as not encompassing deliberate lying by witness where gist of offense was falsehood, not evasiveness, of testimony).

with the refusal of a subpoenaed party to give evidence to the SEC. Such a reading of § 1505 would produce the ironic result that an act otherwise a felony under § 1505, such as the deliberate destruction of important documents, would become a mere misdemeanor if in addition to obstructing the agency's administration of the laws, it was in defiance of that agency's subpoena.

III.

Alo strongly urges that he was deprived of his sixth amendment right to a speedy trial. He claims that the 1969 indictment merely supplanted a substantially identical sealed indictment returned in 1966. Although the government has steadfastly refused to concede the existence of a 1966 indictment, neither has it denied Alo's contention. Both parties have argued the case on the assumption that such an indictment was returned, and we will do the same.

Assuming *arguendo* that there *was* a 1966 indictment, then, we agree with Alo's premise that a superseding indictment, filed for no apparent reason other than to update the earlier one, could not cure an otherwise intolerable delay between the original indictment and trial. The constitutional right to a prompt trial cannot be circumvented by such a simple expedient as reshuffling substantially identical documents.[5]

Viewing as critical the period after the filing of the 1966 indictment, we conclude that the government put off

[5] The government's contention that the delay prior to the filing of the 1969 indictment should be considered pre-indictment delay is based upon the claim that Alo was not arrested until sometime thereafter. However, where an indictment, such as the 1966 indictment of Alo, precedes an arrest, the relevant period begins with the indictment rather than with the arrest, unless, of course, the defendant is a fugitive. See United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964), cert. denied, 380 U.S. 983, 85 S.Ct. 1352, 14 L.Ed.2d 276 (1965).

Alo's trial for approximately three years.[6] Moreover, it has offered no justification for its dalliance. And Alo's silence cannot be considered a waiver of his speedy trial right because he had no knowledge of the sealed 1966 indictment. We are nevertheless constrained to find no unconstitutional delay. As to one of the most crucial criteria for determining impermissible pretrial delay—prejudice to the defendant—Alo's case is fatally defective.[7] Because the 1966 indictment was secret, Alo suffered neither pretrial detention, nor personal anxiety and public obloquy, often the most obnoxious concomitants of an indictment. Moreover, the particular circumstances of the case made it clear that the delay did not hamper Alo's capacity to present his defense. His precise testimony before the Commission was a matter of public record, and the fading memory of witnesses to his answers could therefore not weaken his case. Alo argues, however, that if his trial had been held closer to the time of his SEC testimony, and the other participants in the Warwick Hotel meetings, if called as witnesses, had suffered a similar memory loss, this would have given greater force to his claim of bona fide forgetfulness. Whatever force this might have under other circumstances, here Alo's Warwick co-conferees could remember even at his 1970 trial such basic facts of the meetings as who arranged them, how the dispute arose, and what points of view were expressed.

In light of these circumstances, Alo's contention that we must "presume" prejudice in his case is tantamount to

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[6] Three years is the approximate period between the filing of the sealed indictment sometime in the latter half of 1966 and the filing of the second indictment in October 1969. The eleven-month delay from October 1969 to the beginning of Alo's trial in September 1970 was caused by changes in Alo's counsel, pretrial motions, and adjournments either consented to or requested by Alo.

[7] See United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.), cert. denied, 396 U.S. 936, 90 S.Ct. 269, 24 L.Ed.2d 236 (1969).

advocating the elimination of prejudice as a factor to consider. The sixth amendment speedy trial clause was designed to protect criminal defendants from unfair prejudice [8] rather than to set down a general rule of judicial administration, desirable as such a rule might be on policy grounds.[9] And since pretrial delay may benefit as well as prejudice a defendant, it is incumbent upon him to show that he has been adversely affected.[10] We have not been cited to any decision holding that a Sixth Amendment violation had resulted, where the defendant failed not only in demonstrating actual prejudice in any respect, but also in establishing the credible *possibility* of prejudice.[11]

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[8] United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

[9] Cf. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (promulgated Jan. 5, 1971, effective July 5, 1971) (dismissal of indictments without showing of prejudice).

[10] In this respect the right to a speedy trial would appear distinct from the other rights secured by the sixth amendment. Cf. Dickey v. Florida, 398 U.S. 30, 54-56, 90 S.Ct. 1564, 26 L.Ed.2d 26 (Brennan, J., concurring).

[11] In particular, the opinions which speak of "presuming" prejudice uniformly reveal the substantial possibility of prejudice. See Taylor v. United States, 99 U.S.App.D.C. 183, 238 F.2d 259, 262 (1956) (two-year delay following indictment of which defendant was not informed; loss of alibi witnesses to meet "weak" government case); United States v. Blanca Perez, 310 F.Supp. 550 (S.D.N.Y. 170) (six-year delay following public indictment; death or disappearance of 3 witnesses; emigration of 2 witnesses); United States v. Mann, 291 F.Supp. 268 (S.D.N.Y. 1968) (9½-year delay following public indictment; death of 2 witnesses); In re Provoo, 17 F.R.D. 183 (D.Md.), aff'd per curiam, 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955) (5-year delay following public indictment for capital crime; detention pending trial, with medically diagnosed deterioration in mental health; death or disappearance of "many" possible witnesses). In United States v. Lustman, 258 F.2d 475, 477 (2d Cir.), cert. denied, 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958), although the court found that a convincing showing of prejudice in the preparation

IV.

Alo's alternative ground for dismissing the 1969 indictment requires less extended consideration. He claims that the indictment lacked the requisite specificity. In large part the indictment tracked the relevant portion of the statute, 18 U.S.C. § 1505, reciting that Alo did "unlawfully, wilfully, knowingly and corruptly obstruct and impede and endeavor to obstruct and impede the due administration of laws of the United States * * * under which a proceeding * * * before a department and agency of the United States * * * was then pending and being had * * *." These general allegations were fleshed out with the phrase "by giving false and evasive answers to questions put to him as a witness in such proceeding," and with the appropriate specifics as to date, statute, and names of the administrative agency and proceeding.

Alo's objection to the supposedly vague indictment is that it failed to apprise him of the "nature and cause of the accusation."[12] Considering the fact that Alo's forgetfulness was the constant theme of his testimony before the SEC, we have little doubt that, although somewhat greater specificity would have been advisable, he understood precisely what the phrase "false and evasive answers" referred to.

The last traces of any lingering doubts were clearly removed when upon Alo's request the government served him with two bills of particulars, the first consisting of a transcript of Alo's entire SEC testimony with each al-

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of his case had not been made, the defendant was subject to the ignominy and psychological burden of a public indictment pending for 4 years. In any case, *Lustman's* broad dictum that "a showing of prejudice is not required," *id.* at 478, has not been followed in subsequent decisions of this court. See United States ex rel. Solomon v. Mancusi, 412 F.2d 88, 90-91 (2d Cir.), cert. denied 396 U.S. 936, 90 S.Ct. 269, 24 L.Ed.2d 236 (1969).

[12] U.S. Const. amend. VI.

legedly "false and evasive" answer marked as such. The second bill of particulars specified the manner in which these answers were false, *viz.*, that Alo in fact remembered the facts he claimed to have forgotten, and the manner in which they were evasive, namely that poor recollection was repeatedly invoked to avoid giving the SEC responsive answers.[13]

After a careful review of the entire record, we find Alo's further claims of prejudicial error to be without substance.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of February, one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

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[13] The venerable principle that a bill of particulars cannot "give life to what was dead when it left the grand jury," Foster v. United States, 253 F. 481, 484 (9th Cir. 1918), does not mean that we must ignore the relief which a bill is designed to provide and which Alo received in this case. See also Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); United States v. Lattimore, 94 U.S.App.D.C. 268, 215 F.2d 847, 850 (1954). That principle touches not on the defendant's notice of the case he will have to meet, but on his fifth amendment right to be proceeded against by grand jury indictment. Specificity in the indictment is a corollary of the grand jury right because a loosely phrased accusation would allow the prosecutor to proceed at trial on a theory which the grand jury had never considered. A bill of particulars obviously is no safeguard against such an evasion of the fifth amendment. But no such claim is raised in this case.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

VINCENT ALO, a/k/a Jimmy Blue Eyes,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ R. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of April, one thousand nine hundred and seventy-one.

UNITED STATES OF AMERICA, *Appellee,*

—against—

VINCENT ALO, *Defendant-Appellant.*

It is hereby ordered that the motion made herein by counsel for the appellant for rehearing be and it hereby is denied.

/s/ STERRY R. WATERMAN
Sterry R. Waterman,

/s/ HENRY J. FRIENDLY
Henry J. Friendly,

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,
Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

VINCENT ALO, a/k/a Jimmy Blue Eyes,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be [redacted] hereby is denied.

J. EDWARD LUMBARD
Chief Judge

May 4, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

69 Cr. 746

UNITED STATES OF AMERICA,

v.

VINCENT ALO, *Defendant.*

CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion

Defendant, Vincent Alo, has moved the court to dismiss Indictment No. 69 Cr. 746, filed October 27, 1969, on the grounds that he has been denied the right to a speedy trial as guaranteed by the Sixth Amendment. For the reasons to follow, the motion is denied.

The test for whether a Sixth Amendment right has been violated is nothing more than a careful review of all the circumstances surrounding the delay, to wit, the reason for it, its length and the magnitude of the resulting prejudice, to the end of ascertaining if the delay in bringing the case to trial was "undue or unreasonable." *United States* v. *Simmons,* 338 F.2d 804, 807 (1964); *United States* v. *Colon,* 69 Cr. 707 (Memorandum Opinion, S.D.N.Y. 1970). The court finds that defendant has not satisfied these requirements. Defendant has not shown that the reason for the delay in prosecution was unworthy, despite unsubstantiated allegations to the effect that defendant was indicted on the same charges secretly in 1966. Nor has defendant shown the delay in trial was too lengthy or oppressive. A mere lapse of time alone is not enough to establish denial of a speedy trial. *United States* v. *Simmons, supra,* at 806. Furthermore, and most importantly, defendant has not shown the court that he has been prejudiced in any way by the delay. While one case, *United States* v. *Lustman,* 258

F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958), has been read to create a presumption of prejudice where there has been excessive *post*-arrest delay, *United States* v. *Feinberg*, 383 F.2d 60, 65 n.3 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968), the delay in the instant case occurred prior to arrest. Hence the instant case comes under the pre-arrest delay line of cases, all of which require a showing of prejudice. *United States* v. *Feinberg, supra*, at 64; *United States* v. *Simmons, supra*, at 807; *United States* v. *Colon, supra*.

These findings read together mandate denial of the motion.

So Ordered.

Dated: New York, New York
September 22, 1970

CONSTANCE BAKER MOTLEY
U.S.D.J.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-20

VINCENT ALO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App 1a-11a) is reported at 439 F. 2d 751.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1971. A petition for rehearing was denied on April 26, 1971. Mr. Justice Harlan extended the time for filiing a petition for a writ of certiorari to July 3, 1971, and on July 2, 1971, the petition was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial.

2. Whether wilfully and corruptly giving false and evasive answers constitutes an endeavor to obstruct the due administration of justice within the meaning of 18 U.S.C. 1505.

3. Whether the indictment was unduly vague.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of obstructing the administration of federal securities laws by giving false and evasive answers during investigative proceedings conducted by the SEC. He was sentenced to concurrent terms of five years' imprisonment and fined $5,000 on each count. The court of appeals affirmed.

The facts are set forth in the opinion of the court of appeals. The owners of Scopitone, Inc., a corporation organized to exploit a combination juke box and synchronized film device, wanted to exchange shares of its stock for stock in a corporation known as Tel-A-Sign. Petitioner represented one of the major owners of Scopitone and participated in two conferences in which the owners of the two corporations attempted to settle a disagreement as to the exchange.

When Tel-A-Sign attempted to register some shares in late 1964, the Securities and Exchange Commission ordered an investigation into the matter of Tel-A-Sign's acquisition of Scopitone. The SEC suspected

that petitioner and one Gerardo Catena were undisclosed principals of Tel-A-Sign.

In May 1966, petitioner was subpoenaed by the SEC to testify in the Tel-A-Sign matter. One of the matters under inquiry was the settlement of the dispute between the stockholders of the two corporations. During the course of his testimony, which totalled about ninety minutes, petitioner pleaded a lapse of memory to 134 questions. He testified that he had attended the meetings at his principal's request, and that the meetings concerned a dispute over the distribution of some Tel-A-Sign stock, but claimed to remember virtually nothing else. He failed to recall who had arranged the meetings, how he had learned the time and location, and what had transpired at the meetings other than the fact that one group had been dissatisfied with the stock distribution.

ARGUMENT

1. Petitioner contends that he was denied his Sixth Amendment right to a speedy trial, because the facts necessary to procure an indictment had been available to the government three years before the return of the indictment in 1969.[1] He claims further that a substantially similar sealed indictment had been returned three years earlier. This claim was neither confirmed nor denied by the government below. The case was

[1] The court of appeals noted that the additional eleven-month delay from the return of the 1969 indictment until the trial in September 1970 was due primarily to petitioner's own actions and that any governmental delay during this period was acquiesced in by petitioner (Pet. App. 8a, n. 6).

argued and decided by the court of appeals on the assumption that an indictment had been returned in 1966. Whether a sealed indictment was returned in 1966 or not, the effect on petitioner was the same. Petitioner was neither arrested, incarcerated nor publicly charged. There was no invasion of those interests which the Sixth Amendment speedy trial guarantee was designed to protect. See *United States* v. *Ewell*, 383 U.S. 116, 120. The three-year delay between the offense and the 1969 indictment is thus subject to the same considerations which apply to pre-indictment delay.

In this case, the delay would not warrant dismissal of the indictment for not only was there no prejudice shown but there was no "credible possibility" of prejudice. Since the government's case rested primarily on the recorded testimony of petitioner at the SEC hearing, there was no benefit to be gained by a prosecutorial delay. Although the memories of the other participants in the Warwick Hotel meetings might have dimmed during the period of delay, this could only have inured to the benefit of petitioner. Petitioner's contention, that since the delay was unexplained it should be presumed oppressive, finds no support in law. The Sixth Amendment speedy trial guarantee has never been a basis for dismissal of an indictment brought within the period of the statute of limitations where there was no possibility of prejudice from any pre-indictment delay.

The Court does have before it in *United States* v. *Marion*, No. 70-19, issues as to the standards to be

applied in cases of pre-indictment delay by the government. In view of the absence of any possibility of prejudice in this case, however, there is no reason to delay action on this petition pending a decision in that case. See *Kroll* v. *United States,* No. 1314, O.T. 1970, certiorari denied, May 3, 1971.

2. Petitioner contends that the giving of false and evasive answers at the SEC hearing did not "obstruct, or impede the due and proper administration of the law" within the meaning of 18 U.S.C. 1505. The court of appeals found that the "feigned forgetfulness" of petitioner came within the "plain meaning of the broad language of § 1505," which reads as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or
>
> * * * * *
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The court of appeals found no rational basis for differentiating between concealing information recorded in one's papers and concealing data in one's memory (Pet. App. 5a). The obstruction of the administration of justice is the same in either case, and the statutory language is broad enough to cover both.

We agree with petitioner that Section 1505 should be considered in conjunction with Section 1503 on which it was modelled.[2] The omnibus or "catch-all" clause of Section 1503 has been recognized as "broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice." *United States* v. *Cohen,* 202 F. Supp. 587, 589 (D. Conn.); and see *Falk* v. *United States,* 370 F. 2d 472, 476 (C.A. 9), certiorari denied, *sub nom. Wendell* v. *United States,* 387 U.S. 926; *Catrino* v. *United States,* 176 F. 2d 884, 887 (C.A. 9); *United States* v. *Polakoff,* 121 F. 2d 333, 335 (C.A. 2), certiorari denied, 314 U.S. 626; *Samples* v. *United States,* 121 F. 2d 263, 265 (C.A. 5); *United States* v. *Solow,* 138 F. Supp. 812, 814–815 (S.D.N.Y.); *United States* v. *Siegel,* 152 F. Supp. 370 (S.D.N.Y.), affirmed, 263 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 1012. Further, as pointed out in *United States* v. *Essex,* 407 F. 2d 214, 216–217, 218 (C.A. 6), one of the decisions which petitioner cites as in conflict with the

[2] See H. Rep. 1143, 76th Cong., 1st Sess.; S. Rep. 1135, 76th Cong., 1st Sess.

decision below, Section 1503 originated as a contempt statute, designed to make a crime of, and permit a jury trial for, contempts occurring beyond the presence of the court. That decision thus at least partially supports, rather than conflicts with, the decision below, for it has long been settled that although perjury alone is (as the *Essex* case holds) not sufficient to constitute a contempt by obstructing justice, a refusal to answer is. The wilful giving of answers evasive on their face, such as the claimed loss of memory here, has been deemed the equivalent of a refusal to answer, punishable as a contempt. *Richardson* v. *United States*, 273 F. 2d 144, 147–148 (C.A. 8); *Collins* v. *United States*, 269 F. 2d 745, 749–751 (C.A. 9), certorari denied, 362 U.S. 912; *Howard* v. *United States*, 182 F. 2d 908, 913–915 (C.A. 8), vacated on other grounds, 340 U.S. 898; *United States* v. *Appel*, 211 Fed. 495, 496 (S.D.N.Y.); *Life Music, Inc.* v. *Broadcast Music, Inc.*, 41 F.R.D. 16, 24 (S.D.N.Y.). Where, as here, the testimony on its face, without regard to extrinsic evidence, is clearly not a bona fide effort to answer the question, it is an endeavor to impede and obstruct the administration of justice. *In re Michael*, 326 U.S. 224, 228–229.

Such a construction of Sections 1503 and 1505 (or the contempt statute) is not a means of evading the two-witness rule for perjury, which was reaffirmed in *Weiler* v. *United States*, 323 U.S. 606. The holding here is limited to the situation where the answers are so patently evasive as to be in effect a refusal to answer. Moreover, even on a trial for perjury, it has

been held that where the falsity consists of a claimed loss of recollection, not susceptible of proof by direct testimony, circumstantial evidence alone may support a conviction. *United States* v. *Otto,* 54 F. 2d 277, 279 (C.A. 2); *Behrle* v. *United States,* 100 F. 2d 714, 715–716 (C.A.D.C.); *Fotie* v. *United States,* 137 F. 2d 831, 842 (C.A. 8).

Although two decisions of the Ninth Circuit interpreting Section 1503 evidence a more restrictive approach to language like that found in Section 1505, there is no genuine conflict between those cases and this one. In *United States* v. *Metcalf,* 435 F. 2d 754, and *Haili* v. *United States,* 260 F. 2d 744, the rule of *ejusdem generis* was not used to limit the type of act prohibited, but the type of proceeding covered. In *Metcalf* the court held that Section 1503 did not apply where there was no judicial proceeding in progress, and in *Haili* the court held that interference with probation terms was not covered. The alternative holding in *Metcalf* that Section 1503 prohibits only intimidating actions is, we submit, wrong since it ignores the use in the statute of the word "corruptly," which has almost uniformly been given a very broad meaning.

3. Petitioner claims that the 1969 indictment was unduly vague in that it did not specify the particular answers that were false or evasive. The indictment here proceeded from the general language of Section 1505 to describe the particular means employed by petitioner to obstruct and impede the due administration of justice, namely, "by giving false and evasive

answers to questions put to him as a witness in such proceeding," and specified the dates, administrative agency, proceedings and statute involved.[3]

The theory of the indictment and trial was that the impact of petitioner's entire testimony was to obstruct and impede the hearings by false and evasive answers, and not that any particular answer was perjurous. The gist of the offense of obstruction by false and evasive answers is such that the total effect of the testimony must be one of obstruction on its face. See part 2 above and *In re Michael,* 326 U.S. 224, 228–229. Although a specification as to which answers were false and evasive was not necessary (see *In re Stetser,* 44 F. Supp. 459 (D. Del.)), it was in fact provided in the bill of particulars, leaving no doubt as to the issues petitioner had to meet.

The indictment also was sufficient to protect petitioner against double jeopardy and enable him to plead former conviction in any subsequent proceed-

[3] The indictment charged in Count 1 that:

> On or about 25 May, 1966 in the Southern District of New York, Vincent Alo, a/k/a Jimmy Blue Eyes, did unlawfully wilfully, knowingly and corruptly obstruct and impede and endeavor to obstruct and impede the due and proper administration of laws of the United States, to wit, the Securities Act of 1933 and the Securities Exchange Act of 1934 as amended, under which a proceeding, to wit, an examination and private investigation entitled "In the Matter of Tel-A-Sign", before a department and agency of the United States, to wit, the Securities Exchange Commission, was then pending and being had, by giving false and evasive answers to questions put to him as a witness in such proceeding. 18 U.S.C. 1505.

Count 2 charged in the same language another violation of 18 U.S.C. 1505 on May 26, 1966.

ings. *Russell* v. *United States,* 369 U.S. 749, 763–764. Petitioner is protected against future prosecution since the specifics of the date, proceeding and agency are listed in the indictment. As noted, the false and evasive answers were indicated on a hearing transcript in answer to his request for a bill of particulars.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1971.

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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-20.

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE.

LEON H. KLINE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-20.

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE.

Petitioner prays that this Court grant rehearing of its Order of October 12, 1971, denying the Petition for Writ of Certiorari. In the alternative, petitioner requests that the Court order the Solicitor General to file a memorandum containing information after the manner of the requirement of the Court's order in *Black v. United States*, 384 U. S. 983 (1966), and that the Court, pending receipt of the memorandum, hold in abeyance its determination of this petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The intervening circumstance which warrants rehearing is the information obtained by one of petitioner's counsel, as appears from Exhibit A attached hereto as an appendix, after the denial of the writ herein, justifying a belief that in the course of illegal electronic surveillance conducted by government agents, the voice of petitioner Alo had been overheard, and further justifying a belief that the government deliberately and purposefully delayed the trial of the petitioner Alo after the secret indictment against him in 1966, and caused his re-indictment in 1969 in order to avoid disclosing that it had engaged in the extensive illegal electronic surveillance.

The Secret Indictment of 1966.

As set out in the Petition for Writ of Certiorari (pp. 14-16, 24-27), the government has refused to acknowledge the existence of the secret indictment. This is also true of the government's Brief in Opposition. In adopting this position, the government has both side-stepped its responsibility and gained an advantage. Thus, one of the factors the district court considered significant, in weighing whether a violation of petitioner's right to a speedy trial occurred, was the *reason* for the delay, but the district court found that "[d]efendant has not shown that the reason for the delay in prosecution was unworthy, despite unsubstantiated allegations to the effect that defendant was indicted on the same charges secretly in 1966." (Pet., 14a). The Court of Appeals, which assumed *arguendo* that there was a 1966 indictment, acted on the assumption that the superseding indictment was filed "for no apparent purpose other than to update the earlier one" (Pet., 7a; 439 F. 2d at 755), a reason which hardly comports with an

"unworthy" purpose. But there was a 1966 indictment and the purpose of the suppression of that indictment and the trial delay is a clear example of prosecutorial misconduct and of prejudice to the petitioner. A purposeful and oppressive delay is decisive: *Pollard v. United States*, 352 U. S. 354, 361 (1957). Indeed, the source and reasons for the delay are always relevant and critical considerations. See *United States v. Simmons*, 338 F. 2d 804, 807 (2d Cir. 1964); see the concurring opinion of Mr. Justice Brennan in *Dickey v. Florida*, 398 U. S. 30, 39, 47-56 (1970).

The Electronic Surveillance.

Prior to the trial, a motion was made on behalf of the petitioner seeking the discovery of electronic eavesdropping. Judge Weinfeld stated, "The question of the Alderman [*Alderman v. United States*, 394 U. S. 165 (1965)] obligation of the United States Attorney is there, and I am sure he will comply with his obligations under that decision." (Transcript of the Hearing of February 3, 1970, pp. 3-4; Appendix filed in the Court of Appeals, pp. 3-4). Subsequently, at the trial the Assistant United States Attorney made the following statement which was then accepted by counsel for petitioner:

> "I made the appropriate inquiries with the organized crime section of the Department of Justice, who then made the appropriate inquiries of all the other agencies, the FBI, and the Internal Revenue Service and Post Inspectors, et cetera, and I have been informed by these people that Mr. Alo was not the subject of any electronic surveillance or any overheard conversations. I am authorized to represent that to the Court." (Trial Transcript, p. 283; Appendix filed in the Court of Appeals, p. 231.)

The information obtained after the order of this Court denying the writ, on October 12, 1971, supports a belief that the government's trial counsel did not have all the facts in his possession. See affidavit included in the appendix hereto as Exhibit A.

CONCLUSION.

For the foregoing reasons, petitioner prays that rehearing be granted of the petition for the writ. In the alternative, petitioner prays for an order directing the Solicitor General to make disclosure, first, concerning the reasons for the suppression of the 1966 indictment and the delay of the trial until the second indictment of the petitioner and, second, concerning electronic surveillance coextensively with that required in *Black v. United States*, 384 U. S. 983 (1966), and retaining jurisdiction pending the disclosure.

Respectfully submitted,

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Counsel for Petitioner.

Certificate.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

LEON H. KLINE

APPENDIX.

Exhibit A.

IN THE

SUPREME COURT OF THE UNITED STATES

71-20.

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

JAY GOLDBERG, being duly sworn, deposes and says:

I was the trial attorney for Vincent Alo, petitioner herein. I was also of counsel in the preparation of his brief to the United States Court of Appeals for the Second Circuit from his conviction in the United States District Court in the Southern District of New York. Further, I was co-counsel for petitioner in this Court when his petition for a Writ of Certiorari was filed on July 2, 1971, which was denied on October 12, 1971.

On January 26, 1970, before the United States District Court, Southern District of New York, I filed on behalf of

the petitioner motion papers setting forth several demands for relief, one of which was stated as follows:

> "Requiring the Government to state whether eavesdropping was used in its pre-indictment investigation and if it were, then defendant should be furnished with the exact times and exact places of said use, the parties to the conversations so recorded, as well as the transcripts of any recordings to which he has standing to object, and same should be made available only to the defense and not to the public."

When the pre-trial motion was argued before the District Court the following took place:

> "MR. ZIRIN: No, it sought discovery and inspection. We do not contend that it is the same except to the extent that this motion seeks the discovery of electronic eavesdropping, which is in the nature of discovery and inspection, which was not brought the first time.
>
> MR. GOLDBERG: I will defer that to the trial court. The question of the Alderman obligation of the United States Attorney is there, and I am sure he will comply with his obligations, under that decision. What bothers me is that I have made motions which raise——"

At the trial Government counsel stated the following:

> "MR. NAFTALIS: May I put two matters on the record? Prior to trial Mr. Goldberg made a motion for the government to disclose whether or not Mr. Alo had been the subject of any wiretapping or electronic surveillance as required under Alderman against the United States.
>
> I made the appropriate inquiries with the organized crime section of the Department of Justice, who

then made the appropriate inquiries of all the other agencies, the FBI, and the Internal Revenue Service and Post Inspectors, et cetera, and I have been informed by these people that Mr. Alo was not the subject of any electronic surveillance or any overheard conversations. I am authorized to represent that to the Court."

At the trial (p. 153) the following testimony occurred:

"Q. (Prosecutor) What individuals, if any, was the SEC looking into to see whether or not they were undisclosed principals?"

"A. (SEC Attorney) Mr. Vincent Alo and Mr. Gerardo Catina, the two of them."

After the petition for a writ of certiorari in the above entitled cause was denied on October 12, 1971, I learned that the secret indictment returned against petitioner in 1966 was not proceeded with by the Government because, among other reasons, the Government did not wish to disclose the existence of illegal "bugging" and wiretapping in Alvin Malnik's law office in Miami Beach, Florida. Also I have reason to believe there were other places in New Jersey and Florida where the Government by illegal electronic surveillance overheard statements of petitioner and about petitioner.

JAY GOLDBERG.

Sworn to before me this 1st day of November, 1971.

FRANCES B. DOLAN,
NOTARY PUBLIC, State of New York,
No. 03-0980255,
Qualified in Bronx County,
Commission Expires March 30, 1973.